Supreme Court, U.S.
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No. 99-1910

In the Supreme Court of the United States

OCTOBER TERM, 1999

STEVEN DEZAIO,

Petitioner,

–v.–

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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11 pp

TABLE OF CONTENTS

Page

Table of Authorities ii

Counterstatement of Opinions Below iv

Counterstatement of Statutory and Regulatory Provisions Involved v

Counterstatement of the Case 1

Reasons for Denying the Petition 2

Conclusion 5

TABLE OF AUTHORITIES

Page

Cases Cited:

Baldwin Cty. Welcome Ctr. v Brown, 466 U.S. 147 (1984) 4

Equal Employment Opportunity Commission v Commercial Office Products Co. 486 U.S. 107 (1988) 4 n.1

Hess v. Port Auth. Trans Hudson Corp., 513 U.S. 30 (1994) 2

Irwin v. Dep't. of Veterans Affairs, 498 U.S. 89 (1990) 4

Mohasco Corp. v. Silver, 447 U.S. 807 (1980)..... 3, 4 n.1

Oscar Meyer & Co. v. Evans, 441 U.S. 750 (1979)..... 4 n.1

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) 3

Constitutional Provisions Cited:

Fourteenth Amendment – Equal Protection Clause 4

Statutes and Rules Cited:

29 CFR §1601.13(a)(2)..... v, 4

29 CFR §1614.103(d) 3

29 U.S.C. §633(b) ..... v, 3, 4

TABLE OF AUTHORITIES

Page

Statutes and Rules Cited:

New York State Human Rights Law, N.Y. Exec. L. §291(1) (McKinney's 1993 and Supp. 1999) 2

Supreme Court Rules Cited:

10(a) 2

10(c) 2

COUNTERSTATEMENT OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (A1-7) is reported at 205 F.3d 62 (2d Cir. 2000).

COUNTERSTATEMENT OF STATUTORY AND REGULATORY PROVISIONS INVOLVED

29 U.S.C. §633(b)

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated ...

29 CFR §1601.13(a)(2)

> A jurisdiction having a FEP agency without subject matter jurisdiction over a charge (e.g., an agency which does not cover sex discrimination or does not cover nonprofit organizations) is equivalent to a jurisdiction having no FEP agency. Charges over which a FEP agency has no subject matter jurisdiction are filed with the Commission upon receipt and are timely filed if received by the Commission within 180 days from the date of the alleged violation.

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COUNTERSTATEMENT OF THE CASE

For purposes of the instant brief, respondent, the Port Authority of New York and New Jersey (Port Authority), accepts the statement of facts (as opposed to any conclusions of law) as recited in the petition of Steven Dezaio (petitioner). The Port Authority wishes to point out, however, that there is no dispute that all filings with the Equal Employment Opportunity Commission (EEOC) on behalf of petitioner were made by counsel.

REASONS FOR DENYING THE PETITION

The Court of Appeals Below Correctly Decided the Case In Accordance With Settled Precedent.

Although petitioner's arguments are hardly a model of clarity, what is clear is that petitioner presents absolutely no basis whatsoever for invoking this Court's certiorari jurisdiction. Thus, petitioner is unable to make even an arguable claim either that the decision of the Second Circuit below conflicts with a decision of another Circuit Court of Appeals or of the New York State Court of Appeals within the meaning of Rule 10(a) of this Court, or that the decision conflicts with any relevant decisions of this Court pursuant to Rule 10(c). In fact, quite to the contrary, the opinion of the Second Circuit below was correctly decided fully in accordance with relevant precedents of this Court, as well as those of the New York State courts and the State's Division of Human Rights (DHR).

More specifically, beyond merely stating his unsupported proposition that the New York State Human Rights Law, N.Y. Exec. L. §291(1) (McKinney's 1993 & Supp 1999) is "a statute affecting external conduct which is applicable to the Port Authority" (Pet. at 3), petitioner does not even attempt to demonstrate how the Second Circuit erred in holding, in accordance with relevant state judicial and administrative authority, that the statute is not such an enactment (A5-7). Nor does petitioner even attempt to reconcile his argument regarding the Human Rights Law with this Court's statement that "bistate entities created by compact ... are not subject to the unilateral control of any one of the States that compose the federal system." *Hess v. Port Auth. Trans Hudson Corp.*, 513 U.S. 30, 42 (1994), upon which the Court of Appeals below relied (A2).

Moreover, petitioner's citation of 29 CFR §1614.103(d), relating to the jurisdiction of the EEOC (Pet. at 4), is a glaring *non-sequitur*. The jurisdiction of the EEOC is not at issue in this matter. Rather the issue is petitioner's compliance with the statutory limitations provisions regarding filing with the agency under the Age Discrimination in Employment Act (ADEA). See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982).

Furthermore, in arguing that 29 U.S.C. §633(b), the ADEA's deferral provision, "indicates that in order to invoke the 300 day filing, a state need only have a law prohibiting discrimination in employment" (sic) (Pet. at 6), petitioner completely ignores this Court's decision in *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980). In *Mohasco*, this Court made it absolutely clear that there was nothing in the legislative history of the Civil Rights Act that gave complainants in deferral jurisdictions, such as New York, the right to proceed with less diligence than those in non-deferral jurisdictions. In explaining the operation of and purpose behind the deferral provisions of Title VII, this Court stated:

> The history identifies only one reason for treating workers in deferral States differently from workers in other States: to give state agencies an opportunity to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated. *The statutory plan was not designed to give the worker in a deferral State the option of choosing between his state remedy and his federal remedy, nor indeed simply to allow him additional time in which to obtain state relief.* (Emphasis added)

447 U.S. at 821[1]. Consequently, where, as here, there is no state fair employment practices agency (FEP) with subject-matter jurisdiction over the discrimination charge, the EEOC regulation, 29 CFR §1601.13(a) (2), as correctly found by the Second Circuit below (A6), applies the 180-day limitations period, not the 300-day period. Indeed, the district court's comments to the contrary notwithstanding (A9), there is simply nothing whatsoever inconsistent with the EEOC's regulation requiring that a state FEP have jurisdiction "over a charge" and the language of 29 U.S.C. §633(b) providing for deferral where a cause of action arises in a state that has "authoriz[ed] a State authority to grant or seek relief from such discriminatory practice."

Finally, petitioner fails to explain just precisely how the EEOC's arguable checking of an inappropriate box on petitioner's "Right to Sue Letter" (Pet. at 6) raises any claim whatsoever under the Fourteenth Amendment's Equal Protection Clause. However, insofar as petitioner may appear to be attempting to establish that he somehow was "misled" by the EEOC, or was "prejudiced" because the EEOC may actually have investigated his untimely charge, it should be noted that petitioner failed to raise any such issue either before the district court or the circuit court below and any such claim therefore must be considered waived. In any event, "equitable tolling" would be inappropriately invoked herein where the claimant at all times was fully counseled. See *Irwin v. Dep't. of Veterans Affairs,* 498 U.S. 89, 95-96 (1990); *Baldwin Cty. Welcome Ctr. v Brown*, 466 U.S. 147, 150 fn. 4 (1984).

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[1] The *Mohasco* rationale applies as well to ADEA actions. See *Equal Employment Opportunity Commission v Commercial Office Products Co.* 486 U.S. 107, 123 (1988); see also *Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 755-756 (1979).

Since petitioner has wholly failed to demonstrate that the decision of the Court of Appeals below was, in any way, erroneous, the petition for a writ of certiorari should be denied in its entirety.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
June 20, 2000

Respectfully submitted,

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